



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 19, 2004

Ms. Jennifer Soldano  
Associate General Counsel  
Texas Department of Transportation  
125 East 11th Street  
Austin, Texas 78701-2483

OR2004-1225

Dear Ms. Soldano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 196455.

The Texas Department of Transportation (the "department") received a request for "the executive summaries received from respondents for the SH 45 Southeast RFPQ." You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code. In addition, you have notified third parties J. D. Abrams, L.P./Hill Country Constructors SH 45 ("Hill Country"); Lone Star Infrastructure ("Lone Star"); and Archer Western Contractors ("Archer") of the request and of their opportunity to submit comments to this office. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). In its brief to this office, Hill Country claims that some of its information is excepted from disclosure pursuant to sections 552.104 and 552.110 of the Government Code. We have considered all claimed exceptions and reviewed the submitted information.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information made confidential by other statutes. You assert that some of the submitted information is confidential under section 361.3023 of the Transportation Code, which provides:

- (a) To encourage private entities to submit proposals under Section 361.3022, the following information is confidential, is not subject to disclosure, inspection, or copying under Chapter 552, Government Code, and

is not subject to disclosure, discovery, subpoena, or other means of legal compulsion for its release until a final contract for a proposed project is entered into:

(1) all or part of a proposal that is submitted by a private entity for a comprehensive development agreement, except information provided under Section 361.3022(b)(1) and (2);

(2) supplemental information or material submitted by a private entity in connection with a proposal for a comprehensive development agreement; and

(3) information created or collected by the department or its agent during consideration of a proposal for a comprehensive development agreement.

(b) After the department completes its final ranking of proposals under Section 361.3022(h), the final rankings of each proposal under each of the published criteria are not confidential.

Transp. Code § 361.3023. Section 361.3022(b)(1) and (2) state:

(b) The department shall establish rules and procedures for accepting unsolicited proposals that require the private entity to include in the proposal:

(1) information regarding the proposed project location, scope, and limits; [and]

(2) information regarding the private entity's qualifications, experience, technical competence, and capability to develop the project[.]

Transp. Code § 361.3022(b)(1), (2). Section 361.302 of the Transportation Code defines a "comprehensive development agreement" as "an agreement that, at a minimum, provides for the design and construction of a turnpike project and may also provide for the financing, acquisition, maintenance, or operation of a turnpike project." Transp. Code § 361.302. In this instance, you indicate that the information at issue relates to proposals regarding a comprehensive development agreement. Further, you do not inform us that the department has awarded the contract to which the submitted information relates. Based on our review of your representations and the submitted information, we conclude that, to the extent the submitted information does not come within subsections 361.3022(b)(1) and (2), it is confidential under section 361.3023 of the Transportation Code and must be withheld under section 552.101 of the Government Code.

To the extent the submitted information comes within subsections 361.3022(b)(1) and (2), it is not confidential and may not be withheld under section 552.101. We will, however, consider whether such information involves protected third party interests. We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See Gov't Code* § 552.305(d)(2)(B). As of the date of this letter, neither Lone Star nor Archer has submitted to this office any reasons explaining why its information should not be released. We thus have no basis for concluding that any portion of the submitted documents pertaining to these third parties constitutes proprietary information protected under section 552.110, and none of it may be withheld on that basis. *See Gov't Code* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

We turn now to Hill Country's arguments. The company asserts that its executive summary is excepted from disclosure under section 552.104 of the Government Code. This section excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See Open Records Decision No. 592* (1991). This exception is designed to protect the interests of governmental bodies, not third parties. *Id.* Because section 552.104 is designed to protect the interests of governmental bodies and not third parties and the department has chosen not to raise section 552.104 in this instance, none of the submitted information may be withheld on this basis.

Hill Country also asserts that its information is protected under section 552.110 of the Government Code. This exception protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It

differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.<sup>1</sup> *Id.* This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude that section 552.110(a) applies unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) of the Government Code excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See* Open Records Decision No. 661 at 5-6 (1999) (stating that business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Having considered Hill Country's arguments, we find that the company has neither shown that any of the information in its executive summary meets the definition of a trade secret nor

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<sup>1</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

demonstrated the necessary factors to establish a trade secret claim. Thus, we are unable to conclude that section 552.110(a) applies to any of Hill Country's information. *See* ORD 402. In addition, we find that Hill Country has made only conclusory allegations that release of its information would cause the company substantial competitive injury and has provided no specific factual or evidentiary showing to support its allegations. Accordingly, no portion of Hill Country's executive summary may be withheld pursuant to section 552.110(b).

In summary, to the extent the submitted information does not come within subsections 361.3022(b)(1) and (2) of the Transportation Code, it is confidential under section 361.3023 of the Transportation Code and must be withheld under section 552.101 of the Government Code. To the extent the submitted information comes within subsections 361.3022(b)(1) and (2), it is not confidential and must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

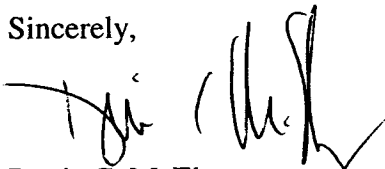
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Denis C. McElroy  
Assistant Attorney General  
Open Records Division

DCM/lmt

Ref: ID# 196455

Enc. Submitted documents

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